Supreme Court, U.S.
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No. 02-1062

IN THE

Supreme Court of the United States

CITY OF WHITE PLAINS,

Petitioner,

v.

TCG NEW YORK, INC., TC SYSTEMS, INC., and TELEPORT COMMUNICATIONS dba TCNY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

The Petitioner is a municipal corporation.

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ARGUMENT

The petitioner, the City of White Plains, New York (the "City"), respectfully submits this Reply to the Brief in Opposition of Respondents ("Opp.").

What Respondents glibly call a "grab bag of issues," Opp. at 13, is in fact a single, coherent argument: the court of appeals made multiple errors, all arising out of the failure to understand that 47 U.S.C. § 253 ("Section 253") represents a deliberate rejection by Congress of federal pre-emption of local authority over rights-of-way management and compensation. The Second Circuit disregarded the text of the statute, the legislative history, and the presumption in the law against preemption of local police regulations. Each of the questions presented deals with an aspect of local authority that Congress preserved and the court of appeals wrongly infringed.

A. Respondents Cannot Avoid the Central Flaw in the Second Circuit's Decision: the Statutory Term "Prohibit" Does Not Mean "Having an Effect on Competition."

The Second Circuit's opinion plainly states that the City's Telecommunications Franchising and Licensing Ordinance (the "Ordinance") violated Section 253(a) because "of the obstacles that the Ordinance poses to TCG's ability to compete in White Plains on a fair basis. . . . ." Pet. App. at 15a. Thus, the Second Circuit effectively interpreted the term "prohibition" to mean "obstacle to fair competition." This distortion of the word "prohibition" is reversible error regarding an important question of federal law. Respondents' arguments on this point at Opp., p. 16, all fail because they ignore the central problem with the decision below: "to prohibit" does not mean "to condition" or "to impede." Furthermore, while, an actual prohibition is a

barrier to competition, not all barriers to competition are necessarily prohibitions.

Respondents attempt to avoid this problem by invoking *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Respondents assert that the City "concedes" that Section 253(a) is ambiguous. Opp. at 15. But the City has made no such concession. Section 253 as a whole has been a cause of *confusion*; this does not mean that subsection (a) is *ambiguous*. The word "prohibit" is not ambiguous and is directed at provisions that maintain the traditional monopoly service provider model. *See Cablevision of Boston, Inc. v. Public Improvement Comm'n*, 184 F.3d 88, 98 (1st Cir. 1999). The phrase "has the effect of prohibiting" refers simply to provisions that in combination serve to maintain the monopoly model. It does not set up a separate class of preempted provisions. Nothing in the City's Ordinance precludes entry by additional providers, and in fact the City has granted other licenses and franchises. Pet. App. at 30a, n. 2; 57a.

Because Section 253(a) is not ambiguous, the FCC's interpretation of Section 253(a) is not entitled to deference.[1] *Chevron*, 467 U.S. at 843-45.

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[1] Respondents claim that the court of appeals adopted an interpretation of the FCC, Opp. at 15, citing *Public Util. Comm'n of Texas*, 14 FCC Rcd 3460 (1997). But the court of appeals did not cite that decision; instead, it cited *In re California Payphone Ass'n, Memorandum Opinion and Order*, 12 FCC Rcd. 14,191 (1997). See Pet. App. 15a. The *Cal. Payphone* case did adopt a standard for finding whether a provision "has the effect of prohibiting," which was restated in the decision cited by Respondents. *Cal. Payphone*, 12 FCC Rcd 14,191 at ¶ 31. But in *Cal. Payphone*, the FCC (1) upheld a local ordinance that prohibited the installation of payphones outdoors on private property; and (2) upheld an agreement with the incumbent local exchange carrier for installation of payphones outdoors in the public rights-of-way. The truth is that the Second Circuit did not conduct the same analysis or apply the same

Finally, Respondents incorrectly claim that the case is factbound, asserting that the City would have the Court reconsider whether there was a delay in processing Respondents' franchise application. Opp. at 18-19. The question presented, however, is whether the court of appeals applied an incorrect interpretation of Section 253(a), for any purpose. The court of appeals did not state that delay was an independent ground for its decision. *See* Pet. at 18, n. 19. But even if the court of appeals considered delay a separate "prohibition" from the terms of the Ordinance, the court presumably applied the same wrong interpretation of the statute in both instances. After all, the statute does not say that "delay" is a basis for preemption; only a "prohibition" can be preempted, and the court of appeals only recited one legal standard. Consequently, the case is not factbound, and turns on the legal issue of what is a "prohibition."

B. The FCC Cannot Give the Courts Guidance on the Meaning of Section 253(c) Because the Statute Expressly Denies the Agency the Power To Interpret that Provision.

Respondents suggest both that the FCC has the power to interpret Section 253(c), and that the agency has in fact done so in a fashion relevant to the issues in this case.[2]

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standard as the FCC did in *Cal. Payphone*. The court of appeals actually created a new, broader, and vaguer standard.

[2] Opp. at 10-11. Respondents also allege that the Petition "misrepresented the nature of the FCC's participation" and failed to disclose the FCC's initial *amicus* brief. Opp. at 11. This is false. The FCC's initial brief was disclosed on page iii of the Petition, along with the briefs filed by other amici. The initial brief was not mentioned in the discussion of the supplemental brief because it was not relevant to the point at issue, which was that when subsequently asked specific questions by the court of appeals, the agency declined to provide the requested guidance. Pet. at 15-16. Respondents also allege that in

Neither is correct. In the Petition, the City made the point that this Court should provide guidance on the meaning of Section 253 because the lower courts will not receive the necessary guidance in these cases from any other source. This is true: no statement by the FCC regarding the meaning of Section 253(c) is entitled to any deference from the courts.[3] *Adams Fruit Co. v. Barrett,* 494 U.S. 638, 649 (1990) (*Chevron* does not extend to matters over which an agency has no authority). The FCC has no policy-making power or expertise regarding local rights-of-way.[4] And

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reproducing the Ordinance in the Appendix of the Petition, the City omitted a provision that they assert gave the City "legal sanction to discriminate," implying that this was a key provision. Opp. at 5, n.1. The provision in question is not part of the Ordinance as codified, and was not one of the provisions challenged or discussed below. *See* Pet. App. 4a and 28a, in which each court refers to the City Code and cites "Articles 1-3" of the Ordinance; Articles 1-3 appear in the Appendix in their entirety. Contrary to Respondent's fanciful interpretation, Opp. at 5, the quoted language formed no part of the analysis of either of the opinions below.

[3] This includes the FCC's two *amicus* briefs. Respondents correctly note, Opp. at 11, that in its initial *amicus* brief the FCC made certain statements about compensation and competitive neutrality. In view of Section 253(d), however, the FCC is entitled to no deference regarding matters within the scope of Section 253(c). Furthermore, by the FCC's own admission it "was not intended to represent a definitive FCC position." *See* Letter from Jane E. Mago, FCC General Counsel, to Kenneth S. Fellman, Chairman of the FCC's Local and State Government Advisory Committee (Oct. 18, 2001) (responding to concerns regarding footnote in brief discussing meaning of term "compensation" in Section 253) (copy appended to this Reply). Indeed, other than the two *amicus* briefs, the FCC has largely avoided speaking on any of the relevant issues. Under the circumstances, neither of the FCC's briefs was entitled to any deference. *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212 (1988).

[4] The closest the agency comes to having any expertise or jurisdiction over rights-of-way is its authority over pole attachments. 47 U.S.C. § 224. The Pole Attachment Act was adopted precisely because the FCC itself had concluded that it had no authority over utility poles and rights-

Section 253(d) specifically precludes the FCC from enforcing matters that are excluded from Section 253(a) by Section 253(c), thus withholding jurisdiction over local rights-of-way.[5] Indeed, although numerous courts have addressed Section 253(c), Respondents are unable to cite a single FCC decision that actually addresses the issues at the heart of this case.

Finally, despite the specific request of the court of appeals, in its supplemental *amicus* brief below, the FCC provided only the most limited answers to the court's questions, and acknowledged that there are "potential issues involving the Commission's jurisdiction under Section 253(c)."[6]

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of-way. SEN. REP. 95-580, at 14 (1977). And the FCC's pole attachment authority extends only to rates and conditions for use of utility facilities; it does not extend to terms and conditions for the use of public rights-of-way. The FCC has no expertise or authority regarding such matters as supervising construction in the rights-of-way, coordinating the activities of multiple users, or proper civil engineering techniques. Nor does it have any expertise or authority regarding compensation for the use of public property.

[5] Contrary to Respondents' argument, Opp. at 15 n.2, the FCC's rulemaking authority under 47 U.S.C. § 201(b) does not apply here, because Congress deliberately and explicitly withheld such authority in Section 253(d). For purposes of Section 201(b), therefore, the "provisions of this Act" regarding which the FCC may adopt rules specifically exclude local right-of-way management and compensation. The express exclusion in Section 253(d) makes this case different from *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 380 (1999).

[6] Supplemental Brief of the Federal Communications Commission and the United States as *amici curiae*, filed in the court of appeals March 12, 2002, at 7, *citing Petition of the State of Minnesota*, 14 FCC Rcd 21697, ¶ 63 (1999).

C. The Factual Distinctions Between *Dearborn* and *White Plains* Are Irrelevant and There Is a Direct Conflict Between the 2d and 6th Circuits on the Compensation Issue.

In *TCG Detroit v. City of Dearborn*, 206 F.3d 618 (6th Cir. 2000), the Sixth Circuit held that the city could charge new providers a fee even though it was not charging the incumbent. In *White Plains*, the Second Circuit held that the City could not charge new providers a fee if did not charge the incumbent. The only difference between the two cases is that in *Dearborn* the court ruled that the incumbent was exempt under state law. But the effect on competition – otherwise the touchstone of Respondents – is the same in both cases. If the Second Circuit was correct when it said that Section 253 "forbids fees that are not competitively neutral, period," Pet. App. at 21a, then the reason for the disparate treatment is irrelevant. Respondents cannot have it both ways: if the effect on competition is the key, then there is indeed a conflict in the two judgments.

Respondents also defend the Second Circuit's assertion that only forward-looking costs are relevant in applying Section 253(c)'s competitive neutrality standard, citing this Court's decision in *Verizon Comm'ns, Inc. v. FCC*, 535 U.S. 467 (2002). Opp. at 21. But *Verizon* bears only the remotest resemblance to the issues in this case. First, *Verizon* was concerned with rates paid by competitors for the use of the incumbent's facilities under 47 U.S.C. § 252 – it says nothing about rents for the use of real property controlled by non-providers, such as the public rights-of-way. Second, the Court was not approving a methodology, but deferring to the agency's interpretation of the undefined statutory term "cost." In this case, Section 253 does not use the term "cost," and in any event, as discussed above, Congress has withheld from the FCC authority to address matters of compensation. So while in *Verizon* the FCC may have had discretion to exclude past consideration in setting prices for unbundled

network elements, there is no general rule of law that says that past consideration must be excluded. Indeed, as the City of New York demonstrates in its *amicus* brief, the fact that one user may have paid an owner for the right to use property in the past does not mean that the owner must now give away comparable property to newcomers at no charge. Brief of *amicus curiae* City of New York at 10-11.

Respondents also fail to acknowledge that even taken on its own terms there is a fundamental contradiction within the Second Circuit's decision. The Second Circuit expressly stated that free use of conduit space could be an element of compensation, Pet. App. at 22a, yet the court failed to recognize that the City's current and continuing right to use Verizon's conduit has a value. Even if past consideration may not be considered, the City receives a future benefit and Verizon forgoes receipt of future rent. The future right to use the conduit has a value, and a rough parity test would demand that that value be compared to the fee requested of Respondents. That is why, if it had followed its own logic, the court of appeals should have remanded the case to the district court.

Respondents place the burden of the Second Circuit's error on the City, essentially claiming that the City had the burden of proving the value of the conduit. Opp. at 23. But this ignores the procedural posture of the case: the City won on the compensation issue in the district court, and the case was decided on summary judgment. The future value of the conduit is only an issue because of the logic of the decision of the court of appeals. So if the judgment of the court of appeals were correct, justice would require a remand.

But of course, the court of appeals and the Respondents are wrong, because the statute does not demand any kind of parity. Congress addressed the very question of the possible disparate treatment of incumbent and competitive carriers in debate on the floor of the House, and

one of the reasons for the adoption of Section 253(c) was to allow for precisely the kind of situation posed by the facts of this case. 141 CONG. REC. H8460-61 (Aug. 4, 1995) (daily ed.). The district courts in both *Dearborn* and *White Plains* recognized this, which is why they reached the opposite result. *TCG Detroit v. City of Dearborn*, 16 F.Supp.2d 785, 792 (E.D. Mich. 1998); Pet. App. at 59a-63a. Indeed, the district court below found that there are essential differences between the two classes of companies, which justify different treatment: Verizon "must offer universal service and affordable rates to the City's residents, while new entrants such as TCG may limit their offerings to the most profitable business centers." Pet. App. at 61a.

In short, the judgment of the Second Circuit was wrong, and there is a clear conflict between the Sixth and Second Circuits.

D. The Non-Fee Provisions Are Worthy of Review Because They Raise Fundamental and Important Questions About the Scope of Federal Power To Preempt Local Legislative Discretion.

The non-fee provisions that were preempted by the court of appeals are worthy of this Court's review because the decision and reasoning of the court of appeals go to the heart of the relationship between federal and local government power. Respondents claim that the court of appeals merely applied Section 253(c) according to its terms, and that "federal law does not permit the City to deny or condition the access of telecommunications providers to public rights-of-way for any reason they deem to promote the public interest." Opp. at 25. But this completely begs the question. Section 253 does not expressly preempt all provisions that include a public interest standard. Nor does the statute create a presumption of preemption, particularly in light of the many expressions in the Telecommunications

Act itself,[7] and its legislative history, of Congress's intent to respect local prerogatives. Merely because a local law contains a public interest standard does not mean it is a Section 253 "prohibition." Nor does Section 253 demand preemption of a local provision that has never even been applied. It is difficult to see how the mere reservation of the right to consider the public interest can be considered to "prohibit or have the effect of prohibiting" the provision of service. By preempting those provisions containing the public interest standard before they were ever applied, the court of appeals improperly applied a form of strict scrutiny.[8]

Respondents miss the point of the City's argument regarding the Constitutional provisions. Opp. at 25-26. The City does not claim that Section 253 itself is unconstitutional. The constitutional issues arise because the Second Circuit ignored its obligation to construe the statute in a way that avoids constitutional problems. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). The court of appeals must have been aware that in preempting local legislation governing a matter of traditional local control, it was treading on dangerous ground. *California v. ARC American Corp.*, 490 U.S. 93, 101 (1989); *see also Solid Waste Agency of No. Cook Co. v. United States Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001). Whether a federal

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[7] In addition to Sections 253(c) and (d), *see* Section 601(c)(1) of the Telecommunications Act of 1996, 110 Stat. 56, 143, codified at 47 U.S.C. § 152 nt.

[8] Respondents fail to comment on n. 28 of the Petition, where we observe that every one of the "public interest" provisions included language limiting its scope to matters that the City could lawfully consider. This makes the rationale of the judgment below even more difficult to understand, since even if strict scrutiny were permissible, its application was unnecessary. The court of appeals appears to have "extend[ed] its invalidation of a statute further than necessary to dispose of the case before it." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985).

court can divest a local legislative body of final discretion over the grant or transfer of the right to use local property is an important question. Respondents would have ample opportunity to address the issue in their brief on the merits, and thus would not be prejudiced.

Finally, Respondents also miss the point when they say that the non-fee provisions "would have violated the competitive neutrality requirement of Section 253(c)" because they were not imposed on Verizon. Opp. at 25. First, it is by no means clear that the competitive neutrality requirement applies to non-compensation provisions. *Cablevision of Boston,* 184 F.3d at 105. And second, the provisions in question[9] were never actually applied to Respondents; the court of appeals wrongly struck those provisions down as facially invalid.

CONCLUSION

The City's petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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March 10, 2003

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[9] Ordinance, §§ 2-7-01(vi); (vii); 2-9-01(xii); (xvii) (Pet. App. at 10b, 12b, 13b); August Proposal, § 14 (Pet. App. at 9d-13d).

Federal Communications Commission
Washington, DC 20554

October 18, 2002

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Re: FCC *Amicus* Brief in *TCG New York, Inc., et al. v. City of White Plains*

Dear Ken:

Thank you for your letter expressing LSGAC's concerns about footnote 7 in the Commission's *amicus* brief in the *White Plains* case. The Commission was involved in the *City of White Plains* case as an *amicus* to express the agency's position that costs imposed on new entrants, but not incumbents are not "competitively neutral and non-discriminatory" under Section 253(c) of the Communications Act, 47 U.S.C. § 253(c). Because the validity of gross revenues based-fees was an issue discussed extensively in the main party briefs, we felt a need to acknowledge the issue and did so in footnote 7. As we have discussed, however, the footnote was not intended to represent a definitive FCC position that Section 253 precludes any compensation above cost recovery. Indeed, we recognized that this is an issue that continues to develop in the courts and before the Commission, and we deliberately limited our discussion of the issue in the *amicus* brief.

We share your concern that others are mis-representing the language of the brief. It is regrettable that some people are misusing it in the way described in your

letter. This is not the first time that has happened with a brief filed by the Commission. In our experience, we believe that the best approach to dealing with this problem is to allow the brief to remain filed with the court as written. The brief says what it says, and the Commission filed the brief with some care to avoid taking a firm position on revenue-based fees. If and when parties review the brief, they will see that is the case. Indeed, if the Commission were now to withdraw the brief or the portion including footnote 7, we believe that action could similarly be misconstrued. Therefore, we are not inclined to take any action with respect to your request.

Thanks again for keeping us informed of developments related to this issue, and please let us know if there are further developments.

Very truly yours,

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General Counsel

No. 02-1062

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CITY OF WHITE PLAINS,

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TCG NEW YORK, INC., TC SYSTEMS, INC.,
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On Petition for a Writ of Certiorari to the
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Certificate of Service

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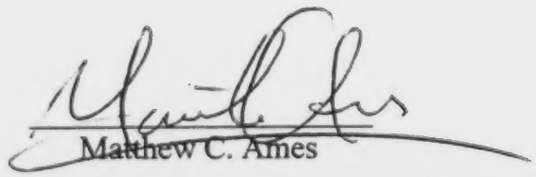

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Washington, D.C.
March 10, 2003